

CLARIFYING THE DIFFERENCE BETWEEN ILOTTERY GAMES AND ONLINE SLOTS/CASINO-STYLE GAMES

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More than a decade ago, gaming industry watchers began discussing the “convergence” of the lottery and gaming industries, driven in part by the move toward internet and mobile (collectively, “online”) lottery and gaming. Since then, lotteries and gaming operators have indeed competed, but the intervening years have also brought significant cooperation between them.

Many of the opportunities for cooperation have existed in regard to sports betting. For example, in New Hampshire and Oregon, DraftKings operates the online sports betting systems for the state lottery,¹ and in Rhode Island, Bally’s casinos host Rhode Island Lottery-operated video lottery terminals, casino gaming and sports betting (retail and online).² In other jurisdictions (e.g., Maryland, Virginia, West Virginia and the District of Columbia) the lottery is responsible for licensing and regulatory oversight of sports betting operators (and in Maryland and Virginia, casinos as well).³

As casino gaming and lotteries converge, however, and in particular in states where online lottery (“iLottery”) and licensed commercial online gaming (“iGaming”) coexist, disputes have arisen as to the difference between “lottery” games and slot/casino-style games.

In general, most states consider a “lottery” to be an activity involving “consideration,” “chance” and a “prize” – i.e., an activity in which one gives “consideration” for an opportunity to win a “prize,” where winning is determined by “chance” (in most states “predominantly” by chance



even though some skill may be involved). Thus, under this very general view, many casino games are “lotteries.”⁴ However, in states which have authorized iLottery and iGaming, the difference between the types of games is not clear, even where an attempt to distinguish them is set forth in the applicable law.

In Pennsylvania, for example, a law was enacted in 2017 (the “2017 Act”)⁵ authorizing the Pennsylvania Lottery and licensed commercial gaming operators to offer games online. When the Pennsylvania Lottery offered online games with similar features as casino games, licensed slot machine operators in the State brought suit, arguing that the iLottery games simulated slot machines in violation of the 2017 Act.⁶

The 2017 Act authorized the Pennsylvania Lottery to offer “iLottery games,”

including “internet instant games.” These were defined as

A lottery game of chance in which, by use of a computer, tablet computer or other mobile device, a player purchases a lottery play, with the result of play being a reveal on the device of numbers, letters or symbols indicating whether a lottery prize has been won according to an established methodology provided by the lottery.⁷

However, the law excluded from the definition “games that represent physical, Internet-based or monitor-based *interactive lottery games which simulate casino-style lottery games*, specifically including poker, roulette, slot machines or blackjack.”⁸

Pursuant to the 2017 Act, slot machine licensees were authorized to offer “interactive gaming.” An “interactive game” was

defined as:

Any gambling game offered through the use of communications technology that allows a person, utilizing money, checks, electronic transfers of money, credit cards or any other instrumentality to transmit electronic information to assist in the placement of a bet or wager and corresponding information related to the display of the game, game outcomes or other similar information. The term shall not include:

- (1) A lottery game or Internet instant game as defined in . . . the . . . Lottery Law.
- (2) iLottery under Chapter 5 (relating to lottery). . . .⁹

Neither the law nor the applicable regulations defined “simulate” or “casino-style” in the context of the 2017 Act,¹⁰ and thus Pennsylvania’s Commonwealth Court was called upon to determine whether the Pennsylvania Lottery’s iLottery games were prohibited “simulated casino-style” games.

After a five-day trial, including several witnesses from the lottery and gaming industries, the Court held in favor of the Pennsylvania Lottery, dismissing the complaint of the licensed slot machine operators and denying their claims for relief. The Court stated (emphasis in original):

Reading the respective restrictions in [the lottery law and the gaming law], the legislature intended that the Lottery and casinos expand their offerings and games into the digital space and for the two offerings to co-exist and, importantly, to be successful. . . . However, the legislature’s decision to prohibit the Lottery from simulating “casino-style” slot machines **does not reflect an intention to preclude** the Lottery from using features or characteristics that are not particular to a casino slot machine. Features **not particular** to a casino slot machine include those that are **generally** present or used in

digital gaming and media, in social or casual games, or in games beyond those offered by casinos (like traditional lottery products). To hold that the use and/or presence of features in slot machines, whether land-based or online, makes those features “casino-style” and subject to their **exclusive** use by casinos, would unreasonably restrict the Lottery’s ability to use modern and popular technology and game features that have their origins **outside** the casino industry in its iLottery games. Conversely, it would be unreasonable to preclude the casinos’ use of the same features in slot machines simply because they may also be used in iLottery games. The Court presumes the legislature did not intend such an absurd result.¹¹

The Court further determined that:

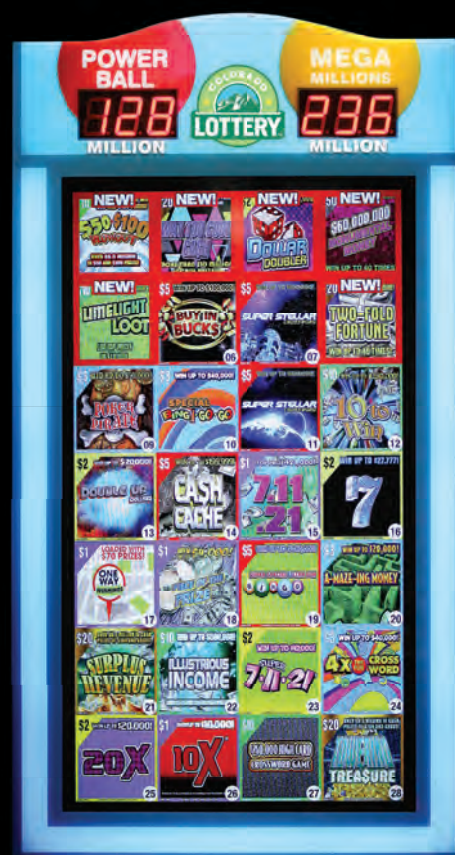
- “Casino-style” is defined as features that are particular to slot machines and not features that are generally present or used in digital gaming, in

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social or casual games, or in games beyond those offered by casinos.¹²

- [T]he following features of iLottery games ... do not simulate “casino-style” features, [and] their use in iLottery games does not constitute the simulation of a casino-style slot machine: the use of [random number generators], par sheets, and certification of mathematical models; the use of reveals like spinning wheels, similar to those used in the games Life or Wheel of Fortune, and cascading and/or exploding tiles; the use of [return to player] values that are similar to online slot machines; or the use of reveal all, auto play, bonus games, adjustable bets, and unlimited play/non-depleting prize pools.¹³
- [T]he use of spinning reels and pay lines *are* signature, iconic, or key features particular to casino slot machines Thus, these features cannot be used by the Lottery.¹⁴

The Court held that because the iLottery games offered by the Pennsylvania Lottery did not use any of the key features particular to casino slot machines, they thus did not simulate “casino-style” games and therefore the petitioning slot machine licensees were not entitled to declaratory or injunctive relief. After post-trial motions for reconsideration were denied,¹⁵ the decision was appealed to the Pennsylvania Supreme Court.¹⁶ Oral argument was held in that Court on April 19, 2023, and a decision is pending.

The Greenwood Gaming opinion, whether or not upheld on appeal, is specific to Pennsylvania and its state laws, and

other state courts may come to different decisions under different (or even similar) state laws. However, it is instructive as to how complex and difficult distinguishing between iLottery and slot/casino-style games can be.

Moreover, this issue may not be confined to Pennsylvania. A similar issue could arise in other states authorizing iLottery and iGaming. In Michigan, for example, the Michigan Lottery offers instant and draw games online, and a 2019 law authorized commercially licensed iGaming.¹⁷ The Michigan “Lawful Internet Gaming Act” authorized licensed operators to offer “internet games,” defined broadly, as:

a game of skill or chance that is offered for play through the internet in which an individual wagers money or something of monetary value for the opportunity to win money or something of monetary value. Internet game includes gaming tournaments conducted via the internet in which individuals compete against one another in 1 or more of the games authorized by the board or in approved variations or composites as authorized by the board. Internet game does not include a social media internet game as that term is defined in section 310c of the Michigan penal code, 1931 PA 328, MCL 750.310c.¹⁸

However, the Act provides that the Michigan Gaming Control Board (“MGCB”) shall promulgate rules regarding, among other things:

The types of internet games to be offered [by licensed iGaming operators], which must include,

but need not be limited to, poker, blackjack, cards, slots, and other games typically offered at a casino, but does not include pick numbers or other lottery games typically offered by the bureau of lottery under the [Michigan lottery law].¹⁹

The Rules subsequently promulgated by the MGCB provide that authorized games do “not include any of the following: pick numbers *or other lottery games typically offered by the bureau of lottery under the [Michigan lottery law]*; a lawful fantasy contest; or any lawful internet sports betting.”²⁰ However, it is not clear what games are “lottery games typically offered by the bureau of lottery,” as “typically offered” is not defined. As a result, it is possible that disagreements could arise as to what iGaming games are authorized.

In summary, as iLottery and iGaming expand in the United States, each state may have difficulty distinguishing between the types of online games the state lottery and licensed commercial operators may offer. The difference between online lottery and online casino games is not clear, and the difference may vary among states, as each state has different laws, histories and sensibilities regarding lottery and gaming. Perhaps the best guidance in this regard is to follow the words of the lower court in Greenwood Gaming, and assume that, by authorizing iLottery and iGaming, “the legislature intended that ... the two offerings [] co-exist and, importantly, [] be successful.”²¹ ■

¹ See the New Hampshire Lottery’s website at <https://www.nhlottery.com/Sports/DraftKings-Mobile-Sports-book> where DraftKings is described as the “Official Sports Betting Partner of NH Lottery,” and see the Oregon Lottery website at <https://www.oregonlottery.org/sports/> where DraftKings is described as the “Official Provider of the Oregon Lottery.”

² See the Rhode Island Lottery Sportsbook website at <https://www.sportsbethodeisland.com/sports> (last accessed August 11, 2023) showing Bally’s Rhode Island casinos as the Lottery’s “partners.”

³ In the District of Columbia, the DC Lottery also operates online sports betting itself – GamebetDC. See <https://gambetdc.dclottery.com/en/> (last accessed August 11, 2023).

⁴ See for example, In re *Advisory Opinion to the Governor (Casino)*, 856 A.2d 320 (R.I. 2004) in which the Rhode Island Supreme Court determined that a proposed casino would be a lottery facility, and that

poker and black jack, as well as roulette, craps and slot machines were “lottery games” for purposes of Article VI, Section 15 of the Rhode Island Constitution, which prohibits “[a]ll lotteries .. in the state except lotteries operated by the state and except those previously permitted by the general assembly ...”

⁵ Act of October 30, 2017, P.L. 419, No. 42.

⁶ *Greenwood Gaming and Entertainment, Inc., et al., v. Commonwealth of Pennsylvania*, No. 571 M.D. 2018 (Pa. Commw. Ct., May 25, 2021, post-trial motions denied by order filed September 8, 2021. Appeal pending, No. 76 MAP 2021 (Pa.).

⁷ 4 Pa.C.S. § 502.

⁸ *Id.* (emphasis added).

⁹ 4 Pa.C.S. § 1103.

¹⁰ See 61 Pa. Code § 876.2.

¹¹ *Greenwood Gaming*, pp. 34-35 (emphasis in original).

¹² *Id.*, at 46.

¹³ *Id.*

¹⁴ *Id.*, p. 44 (emphasis in the original).

¹⁵ *Greenwood Gaming and Entertainment, Inc., et al., v. Commonwealth of Pennsylvania*, Commonwealth Ct. of PA, No. 571 M.D. 2018, filed September 8, 2021 (“Greenwood Gaming”). Appeal pending.

¹⁶ *Greenwood Gaming and Entertainment, Inc., et al., v. Commonwealth of Pennsylvania*, Pa. Sup. Ct. Dkt No. 76 MAP 2021.

¹⁷ Michigan “Lawful Internet Gaming Act,” Act 152 of 2019.

¹⁸ MCLS § 432.303(q).

¹⁹ MCLS § 432.310(a).

²⁰ Mich. Admin. Code R 432.611 (emphasis added).

²¹ *Greenwood Gaming*, p. 34.